STATE OF MICHIGAN

COURT OF APPEALS

LUKE C MIRASOLA,

Plaintiff/Counterdefendant-Appellant,

V

ONN M. MIRASOLA,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
March 18, 2004

No. 250316
Macomb Circuit Court
LC No. 02-001362-DM

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce granting sole physical custody of the parties' minor child to defendant. He claims that the grant of sole custody to the defendant was against the great weight of the evidence. He further claims entitlement to a de novo hearing on the custody issue rather than a hearing on the referee record. Because the record reveals sufficient evidence in support of the custody determination, appropriate discretion by the trial court without legal error on a major issue, and a stipulation by the parties to a hearing by the court on the referee record, we affirm.

Plaintiff argues that the trial court erred in denying a new trial because plaintiff was entitled to a de novo hearing on the custody issue. We disagree. A question of law is reviewed for clear legal error. MCL 722.28; *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998). "A court commits legal error when it incorrectly chooses, interprets, or applies the law." *Schoensee, supra,* 228 Mich App 312.

Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Farm Credit Services v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). Thus, a party cannot stipulate to a matter and then argue on appeal that the resultant action was error. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Plaintiff's motion for a new trial was properly denied because plaintiff stipulated below to waive his right to a de novo hearing and have any appeal of the referee hearing based solely on the record of the hearing and any other testimony or evidence that that court considers

necessary. Because plaintiff stipulated to appeal of the referee's recommendation by de novo review of the record, plaintiff waived the statutory right to a de novo hearing.

Plaintiff claims that the trial court erred in determining custody without conducting a de novo hearing. If either party objects to the referee's report, the trial court must hold a de novo hearing. MCL 552.507(5); MCR 3.215(E)(3)(b); *Cochrane v Brown*, 234 Mich App 129, 131-134; 592 NW2d 123 (1999). The trial court may not base its decision on its review of the file and transcripts of the FOC hearing without conducting its own de novo hearing. *Id.* However, "if both parties consent, the judicial hearing may be based solely on the record of the referee hearing." MCR 3.215(F)(2).

Plaintiff next argues that granting sole physical custody of the parties' minor child to defendant was against the great weight of the evidence. Specifically, factors (b), (c), (d), (e), (f) and (g) were decided against the great weight of the evidence. We disagree.

A multifaceted standard of review is applied to a custody issue. The trial court's custody order must be affirmed unless its findings were against the great weight of the evidence, it committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28. The findings with regard to each factor affecting custody should be affirmed, "unless the evidence clearly preponderates in the opposite direction . . . ." *Hillard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998). The trial court's discretionary rulings, including to whom it granted custody, are reviewed for an abuse of discretion. *Id.* Upon a finding of error, appellate courts should remand to the trial court unless the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994).

There are eleven statutory factors[1] provided in § 3 of the Child Custody Act that the court must consider in order to determine the best interests of children in custody cases. MCL 722.23; *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). With each factor, the court must consider and explicitly state its findings and conclusions. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991).

The best interests of the child are determined by "the sum total of the following factors":

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

[1] The Child Custody Act was amended in 1993 to add a twelfth factor, (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home, or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23; *Bowers v Bowers*, 198 Mich App 320, 327-328; 497 NW2d 602 (1993).]

Plaintiff argues that the court failed to apply the facts evenly with respect to factors (b), (c), (d), (e), (f), and (g). We disagree.

Under the Child Custody Act, a court may not change custody to change the established custodial environment unless presented with clear and convincing evidence that a change is in the best interests of the child. MCL 722.27(1)(c); *LaFleche v Ybarra*, 242 Mich App 692, 697; 619 NW2d 738 (2000). The party moving for custody bears the burden of establishing by clear and convincing evidence that a change in custody is in the best interests of the minor. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991). In a petition for custody change, the first step is to determine the established custodial environment. *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984). As a prejudgment matter, a custodial environment existed with both parties. Therefore, plaintiff must show through clear and convincing evidence that a change of custody is in the minor's best interest. *LaFleche*, *supra*, 242 Mich App 697. The court must find a compelling reason to change custody, requiring more than a marginal improvement in the minor's life. *Carson v Carson*, 156 Mich App 291, 301; 401 NW2d 632 (1986).

The second factor, MCL 722.23(b), looks at "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." See *Fletcher v Fletcher*, 229 Mich App 19, 26; 581 NW2d 11 (1998). Plaintiff argues that under factor (b), plaintiff is Catholic and has

always expressed a desire to have the minor brought up in the Catholic Church. Plaintiff seeks to have the minor brought up in the faith, and is a member of a parish near his house. When the subject of religion came up, plaintiff clearly stated that the minor was not being raised in any particular faith, and did not elaborate to say that he would like to raise the minor in the Catholic faith.

When reviewing a trial court's findings, this Court generally will not weigh the credibility of a witness or replace its assessment of the testimony for that of the trial court. MCR 2.613(C*); Fletcher, supra,* 447 Mich 890. However, a court cannot immunize its findings from review by alleging that they are found on pure credibility determinations in light of other evidence. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).

In this case, there was no testimony on the fact that plaintiff wanted the minor raised in the Catholic faith, and when asked about it, plaintiff only stated that he would take the minor to church if the minor asked to go. Because plaintiff testified that he would take the minor to church if the minor asked to go, but did not testify that plaintiff desired to raise the minor in the Catholic Church, there is no indication that the evidence for this factor clearly preponderates in plaintiff's favor. *Hillard, supra*, 231 Mich App 321.

The third factor, MCL 722.23(c), looks at "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." Plaintiff argues that because defendant testified that she does not want to continue working at her current employment because "she can't afford to live on her present salary," the factor should have weighed in favor of plaintiff. Defendant was found to do "a more than adequate job providing" for the minor on her present salary. The referee's decision, which the court upheld, was based on the fact that both plaintiff and defendant properly provided for the minor at the time of the hearing. Because both parties properly provide for Dominic, there is no indication that the evidence for this factor clearly preponderates in the plaintiff's favor. *Hillard, supra*, 231 Mich App 321.

The fourth factor, MCL 722.23(d), looks at "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Plaintiff argued that factor (d) was wrongly decided because both parties admitted that defendant was the primary caregiver until 1999 and not until 2002, as the recommendation indicated. The recommendation is inconsistent where it asserts that defendant returned to work in 1999 by her own choice. Defendant admitted that the parties have been joint caregivers since 1999.

Contrary to plaintiff's argument, the recommendation did not specifically state when defendant stopped being the primary caregiver. The court also addressed the issue on review, after counsel for plaintiff stated that defendant returned to work in 1999:

> *THE COURT:* No, I'm aware of that. That's what I meant by she was the primary custodian in the child's life, and the last four years they pretty much shared it, but for the first four years she was the primary custodian of the child.

MR. BENJIN (Counsel for Plaintiff): Right, but after – for the last three years, they just shared it jointly.

THE COURT: No. I am well aware of that fact.

What I mean is that's – from what I got on that record was nothing to disrupt the finding of the referee. That's the best I can say in this particular case.

The court also found that defendant was the primary custodian in the minor's life, allowing for the fact that defendant returned to work in 1999.

Further, even if the recommendation can be read to indicate that defendant was the primary caregiver until 2002, this premise is supported by testimony stating that although defendant arrived home from work two hours after Dominic and plaintiff began spending time together, Dominic was seldom bathed or fed and defendant would take care of those duties. Defendant's unrebutted testimony stated that she was the primary caregiver up until the filing for divorce. Because the recommendation did not specify until what point defendant was the primary caregiver and because, even if it is read to mean 2002, it is still supported by testimony, there is not an indication that the evidence for this factor clearly preponderates in plaintiff's favor. *Hillard, supra*, 231 Mich App 321.

The fifth factor, MCL 722.23(e), looks at "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Plaintiff argued that factor (e) was wrongly decided because plaintiff wants to solely purchase the marital home and continue living there, without moving the minor from his established environment, friends or school. Plaintiff again cites defendant's testimony that she will not be able to care for herself and the minor under her present employment.

The recommendation indicated that both parties would remain in the same school district and in the same area as the minor has resided in for the past few years. The testimony also indicated that the pre-qualification that plaintiff points to does not cover the full purchase price of the house, and it is not clear how plaintiff would obtain the remainder of the purchase price. Plaintiff did suggest that he would borrow the money from relatives, but also said that if he could not obtain the money, he would move somewhere else within the school district, placing him in the same position as the defendant. Further, it is not accurate to assume that whichever party remains in the marital home automatically gains custody of the child. The child is not meant to be an fixture who goes with the house. The factor intends to focus on the family as a unit and its ability to stay intact, and not the physical structure within which the family unit resides. See *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996); *Fletcher, supra*, 447 Mich 884-885. Because the factor does not focus on who is remaining in the marital home, but rather, on the permanence of the family unit, there is no indication that the evidence for this factor clearly preponderates in plaintiff's favor. *Hillard, supra*, 231 Mich App 321.

The sixth factor, MCL 722.23(f), examines "[t]he moral fitness of the parties involved." Plaintiff states that the findings for factor (f) are against the great weight of the evidence, stating that the Referee failed to consider three affairs that plaintiff states defendant admitted to.

Factor (f) "relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship." *Hillard, supra*, 231 Mich App 323-324. There was no testimony showing that the minor was harmed by the behavior of plaintiff or defendant with regard to extra marital affairs, as the Referee indicated and the court affirmed. In light of this, it was not against the great weight of the evidence for the trial court to conclude that the parties were equally morally fit within the meaning of MCL 722.23(f)

The seventh factor, MCL 722.23(g), examines "[t]he mental and physical health of the parties involved." Plaintiff also suggests that the court's findings on factor (g) are against the great weight of the evidence, stating that the Referee failed to find that defendant's suicide attempt or her personality disorders affected her ability to parent the minor.

Upon the de novo review, the court stated that with regard to defendant's suicide attempt:

> First of all, I'm not putting the children with the mother for them to live in chaos. I want the record to be perfectly clear that I did recognize the fact that the mother made a suicide attempt. There may be some psychological problems she has. From my understanding, she's addressing those psychological problems.
>
> I do not find parents to be without problems. If I was to get perfect people, we would have no parents and no children. So, I have to leave the parents the way I find them since I didn't make this person a parent but your client did . . .
>
> * * *
>
> So, the point is that as long as she is treating for her malady, whatever it is, and she's taking care of it, the Court's satisfied that the children are not in harm's way with custody in the mother.

It is not against the great weight of the evidence for the court to find that factor (g) does not favor either party. The court explained that every parent has faults, and that the court does not believe that the minor is in harm's way. The court also acknowledged that defendant was treating for her maladies.

In viewing the "sum total" of the factors under MCL 722.23, the court did not abuse its discretion in determining that granting sole physical custody of the minor to defendant was in the best interest of the child. *Hillard, supra,* 231 Mich App 321. Eight of the eleven factors under MCL 722.23 did not favor either party. Two factors were decided in favor of defendant, including (d) and (k). Factor (i), the reasonable preference of the child, contained in the Confidential Child Preference Report, was considered. The court did not abuse its discretion in determining that granting sole physical custody of the minor to defendant was in the best interest of the child. *Hillard, supra,* 231 Mich App 321.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio